the courts are divided, but probably the better view is that here too the law in force at his death controls.[17] It might seem to follow that a revocation was governed by the same law. A revocation is simply a formal expression of intent that the will should not take effect at death. But this intent is accomplished by cutting the will off in its youth without waiting until it is full grown. A revocation takes immediate effect upon the inchoate existence of the will. This is brought out by the law on revival. If a revocation were purely ambulatory and took effect only upon death, its own revocation would surely be enough of itself to allow the original will to be probated as if nothing had happened. But in general the Wills Act[18] in England and the American statutes in accord require a re-execution of the will,[19] and the other line of legislation requires a clear intent to revive it by the terms of the revocation.[20] Doubtless this legislation is prompted by the same policy which favors a formal execution of the will in the first place. But the former type of statute shows that the revocation must have taken immediate effect upon the will and the latter type certainly points the same way. In fact the very term "revival" indicates that the will suffered before the testator's death. And authority is in accord. The distinct majority of cases hold that an alleged revocation is governed by the law in force at the time it was made.[21]

LIABILITY FOR ATTACK BY MAD DOG KNOWN TO BE VICIOUS. — It is well settled that at common law the owner of a domestic animal is not

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[17] For law at death: Wakefield *v.* Phelps, 37 N. H. 295 (1858); Langley *v.* Langley, 18 R. I. 618, 30 Atl. 465 (1894); Sutton *v.* Chenault, 18 Ga. 1 (1855); Lawrence *v.* Hebbard, 1 Bradf. (N. Y.) 252 (1850). See 1 JARMAN, WILLS, 6 Am. ed., 332 n.; REDFIELD, WILLS, 3 ed., § 30 a (17) (18). *Cf.* Moultrie *v.* Hunt, 23 N. Y. 394 (1861). For law at date of execution: Lane's Appeal, 57 Conn. 182, 17 Atl. 926 (1889); Packer *v.* Packer, 179 Pa. St. 580, 36 Atl. 344 (1897); Barker *v.* Hinton, 62 W. Va. 639, 59 S. E. 614 (1907). See SCHOULER, WILLS, 3 ed., § 11.

Nothing turns on whether the law in force at death validates or invalidates the will.

[18] See 7 WM. IV & 1 VICT., c. 26, § 22.

[19] For a list of these statutes see WARREN, CASES ON WILLS, 315 n.

[20] For a list of these statutes see WARREN, CASES ON WILLS, 320 n.

[21] Goodsell's Appeal, 55 Conn. 171, 10 Atl. 557 (1887); Swan *v.* Sayles, 165 Mass. 177, 42 N. E. 570 (1896); *In re* Tuller, 79 Ill. 99 (1875). See Smith *v.* Clemson, 6 Houst. (Del.) 171 (1880).

The same rule applies where the conflict is between laws of different sovereigns. *In re* Martin, [1900] P. D. 211. See 14 HARV. L. REV. 379. See MINOR, CONFLICTS, § 149. *Contra*, Coburn's Will, 9 Misc. (N. Y.) 437, 30 N. Y. Supp. 383 (1894). The following two cases turn upon Lord Kingsdown's Act, note 11, *supra*: — Goods of Reid, L. R. 1 P. & D. 74 (1866); In the Estate of Groos, [1904] P. D. 269. But the language in the former case indicates that apart from the statute the law at death should govern, while the language in the latter favors the law at the date of the alleged revocation.

As far as the problem of conflicts goes it should make no difference whether the law in force at the time the revocation was made rendered it valid or not. If a revocation is a complete act, effective at once, it must stand or fall by the law in force at that time. And it is immaterial whether the revocation is by act, codicil, or operation of law. The distinction between a codicil and an actual tear for the purpose of conflicts of laws is only apparent. The reasoning above turns upon the effect rather than the superficial character of the revocation.

liable, in the absence of *scienter*, for injuries caused by it.[1] Even after he acquires knowledge of a propensity in the animal to cause harm, he is liable, by the weight of authority, not for all damage the animal may thereafter cause,[2] but only for those types of injuries which he knew it had a propensity to inflict.[3] For instance, an owner knowing only that his dog has a ferocious disposition toward other animals, cannot be held for an attack upon a human being.[4]

The foregoing rule has often led to the general statement that the owner is liable only for the injuries resulting from some vicious or mischievous disposition of which he had notice.[5] And since ordinarily injuries committed by an animal are due to its viciousness, it is usually immaterial whether it be said that the owner is liable because he knew from the nature of the animal that the type of *act* committed was to be expected, or because the act was in fact due to some *disposition* of which he had knowledge. It sometimes happens, however, that although the owner had notice of a vicious disposition which would naturally lead the animal to commit a certain injury, the animal commits that very injury not on account of its viciousness, but for some other reason of which the owner had no notice. These circumstances existed in a recent Missouri case.[6] The owner of a dog knew that it was vicious. But unknown to the owner, the dog became afflicted with rabies and bit a child, causing her death by hydrophobia. The death being a proximate result of the bite,[7] the owner clearly would be liable for it had the bite been due, even in part, to the dog's viciousness. Assuming, however, that the bite was not due to viciousness but solely to the rabies,[8] should not the result be the same? [9]

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[1] Mason *v.* Keeling, 12 Mod. 332 (1699); O'Connell *v.* Jarvis, 13 App. Div. 3, 43 N. Y. Supp. 129 (1897); Domm *v.* Hollenbeck, 259 Ill. 382, 102 N. E. 782 (1913).

[2] But see Quilty *v.* Battie, 155 N. Y. 201, 204, 32 N. E. 47, 49 (1892); Speckmann *v.* Kreig, 79 Mo. App. 376, 381 (1899).

[3] Cox *v.* Burbidge, 13 C. B. (N. S.) 430 (1863); Klenberg *v.* Russell, 125 Ind. 531, 25 N. E. 596 (1890).

[4] Keightlinger *v.* Egan, 65 Ill. 235 (1872); Osborne *v.* Chocqueel, [1896] 2 Q. B. 109.

[5] See Merritt *v.* Matchett, 135 Mo. App. 176, 178, 115 S. W. 1066, 1068 (1909), *per* Johnson, J.

[6] Clinkenbeard *v.* Reinert, 225 S. W. (Mo.) 667. For the facts of this case see RECENT CASES, p. 783, *infra*.

[7] *Cf.* Armstrong *v.* Montgomery St. Ry. 123 Ala. 233, 26 So. 349 (1899); Day *v.* Gr. East. Cas. Co., 104 Wash. 575, 177 Pac. 650 (1919). See J. H. Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633, 645.

[8] It may be that the ferocity of a mad dog is to some extent regulated by its natural disposition. See 14 ENCYCLOPAEDIA BRITANNICA, 11 ed., 168. If this is so it cannot be said that any bite of a mad dog, normally vicious, is not due, at least in part, to its viciousness.

[9] The court held the defendant liable on the ground that on learning of the dog's viciousness, he kept it at his peril of answering for all injuries it might thereafter inflict. But see cases cited in note 3, *supra*. The decision of the court may, however, be justified by the fact that the injury would not have occurred but for the violation of a local ordinance forbidding the harboring of vicious dogs and apparently designed to prevent, among other things, attacks upon human beings. See E. R. Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317, 328. But see Marsh *v.* Koons, 78 Oh. St. 86, 84 N. E. 599 (1908); Heath's Garage (Ltd.) *v.* Hodges, 32 T. L. R. 134 (1915); Bowen *v.* Lightfoot, 52 Dom. L. R. 305 (1920).

While the precise question seems never to have arisen before,[10] it appears that on both reason and authority when the owner has notice that his dog has a propensity to bite mankind, he should thereafter be liable for any bite inflicted by it, whether proceeding from a ferocious disposition or not. All animals being to some extent a menace to the public, the general security demands restraint. The reasons for not imposing absolute liability in the case of ordinary domestic animals not known to be dangerous are not only that the menace is comparatively slight, but also that the owner should not be held for those injuries which, not being expected, he reasonably omits to provide against. But as soon as he has reason to anticipate a certain type of injury, having been put on his guard, he must prevent injuries of that type.[11] A change in the circumstances which may induce the animal to commit those injuries, whether known or not, can surely be no excuse for a failure to prevent them. Having reason to expect injuries of a certain type he must at his peril [12] restrain the animal from committing those injuries. This rule seems to be borne out by the early cases, where the stricter rules of pleadings were enforced, in which the material averment of *scienter* was that, well known to the defendant, the animal was accustomed to commit the very type of injury that occurred.[13] And in cases where it is doubtful whether the injury was caused by a ferocious disposition of the animal or by mere playfulness, the courts have refused to inquire into the motive of the animal, but have held it sufficient for recovery that the type of injury inflicted was to be expected.[14] *Scienter*, in other words, refers not to the disposition of the animal, but to the fact that it may be expected to commit a certain type of injury.[15] Otherwise in order to recover for a dog's bite it would be necessary for the jury to determine in each case whether the bite was due to playfulness, or to viciousness, or to the rabies,[16] and then find that the owner had knowledge of the particular condition that brought about the injury.

Having been put on his guard, it became the defendant's duty, in the case under discussion, to prevent any and all bites which might be inflicted by that dog on human beings. This duty continued as long as the dog had a propensity so to bite. Its subsequent affliction with

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[10] In Hadwell *v.* Righton, [1907] 2 K. B. 345, the defendant's fowl while straying on the highway was chased by a dog into the wheel of the plaintiff's bicycle. The court denied recovery but suggested that if the defendant had known of any habit in the fowl to fly at wheels, he would have been liable.

[11] Gething *v.* Morgan, 29 L. T. R. 106 (1857). See 2 COOLEY, TORTS, 3 ed., 697.

[12] This is true in all but a few jurisdictions where he is held only to due care in restraining the animal. Worthen *v.* Love, 60 Vt. 285, 14 Atl. 461 (1888); Hayes *v.* Smith, 62 Oh. St. 161, 56 N. E. 879 (1900); De Gray *v.* Murray, 69 N. J. L. 458, 55 Atl. 237 (1903).

[13] Worth *v.* Gilling, L. R. 2 C. P. 1 (1866); Read *v.* Edwards, 17 C. B. (N. S.) 245 (1864); see Osborne *v.* Chocqueel, [1896] 2 Q. B. 109, 111. But see Hartley *v.* Harriman, 1 B. & Ald. 620 (1818).

[14] State *v.* McDermott, 49 N. J. L. 163, 6 Atl. 653 (1886); Oakes *v.* Spaulding, 40 Vt. 347 (1867).

[15] See Duval *v.* Barnaby, 75 App. Div. 154, 77 N. Y. Supp. 337, 338 (1902).

[16] If "the devil himself knoweth not the mind of man," we can scarcely expect the jury to determine with any degree of certainty what was going on in the mind of a dog.

rabies, though it imposed no further duty upon the owner, since he had no notice of it, did not alter the duty already imposed of restraining the dog from biting. Having failed in this, the defendant was rightly held liable for the death that resulted.

Amici Curiae.— In all trials, while the parties supply the knowledge of the facts particular to their quarrel, the court on its part supplies the necessary knowledge of law and of such fact, generally accepted, as will be judicially noticed.[1] In many cases a court has discretion to inform itself, in addition, of facts beyond the scope of judicial notice and to act upon them *sua sponte*, to prevent a miscarriage of justice.[2] To fulfill all these duties a court may frequently require more than that assistance which is usually rendered by the counsel of parties to the case. Accordingly, the custom was early adopted [3] and has been uniformly adhered to of allowing counsel unconnected with a case to give advice, either on request of the court or by its permission,[4] as *amici curiae*. Even a mere bystander may so appear.[5] The advice so given is embodied in the form of a suggestion.[6] It is often referred to as a motion,[7] although denial of such a motion gives no right of appeal.[8] Nor may either party object to the receipt of a suggestion of this sort unless it was clearly improper.[9] An *amicus curiae* cannot perform any act on behalf of a party; [10] his

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[1] Ryder *v.* Wombwell, L. R. 4 Ex. 32 (1868); Clough *v.* Goggins, 40 Ia. 325 (1875). See 4 Wigmore, Evidence, §§ 2565–2582.

[2] Coulson *v.* Disborough, [1894] 2 Q. B. 316; Serle *v.* St. Eloy, 2 P. Wms. 386 (1726). And see other examples in notes 18, 19, 21–25, *infra*.

[3] Collections of the cases appearing in the Year Books will be found in Theloall's Abridgment, 200, and in 2 Viner's Abridgment, 475–476. One of the earliest cases in which the term appears is Y. B. 4 Hen. VI. 16 (1426). All pleaders (countors), as distinguished from attorneys, were in their beginnings curiously similar to *amici curiae*. See 1 Pollock and Maitland, History of English Law, 2 ed., 211–217. In theory all argument of law before a court is directed rather to inform the court than to persuade it.

[4] Post *v.* Louis, 172 N. Y. Supp. 561 (1918). In this case the appellate court refused to force upon the trial court the advice of an *amicus curiae* which the trial court had declined.

[5] Falmouth *v.* Strode, 11 Mod. 136, 88 Reprint 949 (1708); Williams *v.* Blunt, 2 Mass. 207 (1806). The statute of 5 Hen. IV, c. 8 (1403) (1 Stat. at L. 458), provided with reference to feigned suits of debt: "(5) It is ordained and stablished, That the Justices in the King's Courts, and other Judges, before whom such Suits and Actions . . . shall be sued and taken, shall have Power to examine the Attorneys, and others whom please them, and thereupon to receive the Defendants to their Law, etc." It has been said that a statute of 4 Hen. IV (1403) extends the privilege of appearing as *amicus curiae*, previously confined to lawyers, to all bystanders. See "*Amicus Curiae*," 11 Pitts. Leg. Jour. 321. If the reference is to the provision above, it somewhat misstates the effect of the words. It can hardly be said that every witness called by a judge is an *amicus curiae*, and the converse is certainly not true.

[6] The *Maipo*, 252 Fed. 627 (1918).

[7] Haley *v.* Bank, 21 Nev. 127, 26 Pac. 64 (1891).

[8] Birmingham Loan Co. *v.* National Bank, 100 Ala. 249 (1893); Douglas *v.* Trust Co. of Georgia, 147 Ga. 724, 95 S. E. 219 (1918).

[9] The *Claveresk*, 264 Fed. 276 (1920).

[10] Thus he may not give notice of a motion for a rehearing. Burns *v.* State, 173 Pac. 785 (Wyo.) (1918).